CHING LAI HUAT

v.

UOL CREDIT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-137-2000]
15 NOVEMBER 2000

CIVIL PROCEDURE: *Summary judgment - Affidavit - Affidavit in support to application for summary judgment - Whether grounds stated in notice of application sufficient - O. 26A Subordinate Court Rules 1980*

CIVIL PROCEDURE: *Appeal - Record of appeal - Contents of - Failure to state in notice of application "the 3rd defendant has no defence" - Whether rendered notice defective - O. 26A Subordinate Court Rules 1980*

HIRE PURCHASE: *Hire purchase agreement - Agreement signed and deposit paid - Whether constituted valid deposit in law - Question of ownership of goods hire purchased - Whether true hire purchase agreement existed*

CONTRACT: *Hire purchase - Guarantee - Liability of guarantor to indemnify all sums due and owing - Binding effect of Certificate of the Hirer's Indebtedness*

This was the 3rd defendant's appeal, resisting the Sessions Court's summary judgment allowing the plaintiff/respondent's application under O. 26A of the Subordinate Court Rules 1980 ("SCR") in respect of the 1st defendant's monetary debt to the plaintiff. By a guarantee and indemnity, the 2nd and 3rd defendant had agreed to guarantee and indemnify the plaintiff of the debt which accrued as a result of a breach of terms committed by 1st defendant under a hire purchase agreement ("the agreement").

Held:

[1] Even though the plaintiff's notice of application did not state as a ground that "the 3rd defendant has no defence", the said notice was not defective. It is not provided anywhere in O. 26A of the SCR that in an application for summary judgment, it must be stated as a ground in the notice of application that the defendant has no defence to the plaintiff's claim. (p 453 a-b)

[1a] Instead, an affidavit in support to an application for summary judgment must state "in the deponent's belief there is no defence to that claim", which had already been complied with by the plaintiff in its affidavit

in support. Further reference to the plaintiff's notice of application revealed a statement that the 3rd defendant had no defence to the plaintiff's claim, and this in itself was sufficient. (p 453 d,g)

[2] When the 1st defendant made the offer to the plaintiff for the hire purchase facility, the 1st defendant had expressly agreed that the deposit paid by them to the dealer would be applied by the dealer towards the deposit payable under the agreement and the deposit would therefore constitute a valid deposit in law. (p 454 b-c)

[2a] Hence, the plaintiff was the legal owner of the goods hire purchased whereas the 1st defendant only held the title of a registered owner of the goods hire purchased. Thus, the 3rd defendant's contention that the agreement was invalid as the plaintiff was allegedly not the exclusive owner of the goods hire purchased but was sharing ownership with the 1st defendant who had made payment of deposit to the dealer, was unfounded. (pp 453 h & 455 c)

[3] The agreement was a true hire purchase agreement with all the elements of a hire purchase agreement. It was not a cloak for money lending transaction and neither were there any mutual mistakes as to ownership by the parties. The 3rd defendant was liable to the plaintiff as the guarantor and indemnifier for all the sums due and owing by the 1st defendant as certified by the Certificate of the Hirer's Indebtedness. (pp 456 h, 457 c & 458 b-c)

[Appeal dismissed, decision of Sessions Court upheld.]

Case(s) referred to:

Anglo-American Corporation (M) Sdn Bhd v. Dato' Phua Cheng Leong [1969] MLJ 12 ***(foll)***

BSN Commercial Bank (M) Bhd v. KDG Holdings (M) Sdn Bhd & Ors [1999] 2 CLJ 180 ***(foll)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(foll)***

Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 84 ***(foll)***

Low Ping Ming v. MBf Finance Bhd [2000] 2 CLJ 307 ***(foll)***

Malayan Credit Ltd v. Mohamed Kassim [1965] 2 MLJ 134 ***(refd)***

Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn Bhd & Anor [1988] 2 CLJ 87; [1988] 1 CLJ (Rep) 793 ***(refd)***

Tan Tik Sing v. Gomez Development Co Sdn Bhd [1979] 2 MLJ 79 ***(foll)***

Tractors Malaysia Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129

Transport and General Credit Corporation Limited v. Morgan [1939] 1 CH 531 ***(refd)***

United Engineers (Malaysia) Ltd v. Lai Ping Yoon [1968] 1 MLJ 189 ***(foll)***

United Investment and Finance Ltd v. Walker & Anor [1967] 1 MLJ 30 ***(refd)***

Legislation referred to:
Subordinate Court Rules 1980, O. 26A r. 2(1)

For the appellant - GF Chan; M/s Tan Chap & Assocs
For the respondent - KS Ong; M/s KS Ong & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Faiza Tamby Chik J:
This appeal is by the 3rd defendant/appellant and it is against the decision of the Kuala Lumpur Sessions Court which allowed the plaintiff/respondent's application to, *inter alia*, enter summary judgment against the 3rd defendant under O. 26A of the Subordinate Court Rules 1980 with costs on 30 March 2000.

The pleadings filed by both sides are as follows:

1. Summons dated 3 November 1998 (hereinafter referred to as "the said summons") and statement of claim dated 29 October 1998 (pp. 75 - 81 Appeal Record);

2. Amended notice of application (pp. 1-3 Appeal Record);

3. Affidavit of Peh Lay Hwa affirmed on 24 February 1999 (hereinafter referred to as "the affidavit in support") [pp. 4-36 Appeal Record];

4. The 3rd defendant's affidavit-in-reply of Ching Lai Huat affirmed on 7 May 1999 (hereinafter referred to as "Ching's 1st affidavit") (pp. 43-59 Appeal Record);

5. Plaintiff's affidavit-in-reply of Peh Law Hwa affirmed on 19 May 1999 (hereinafter referred to as "Peh's 1st affidavit-in-reply") (pp. 43-59 Appeal Record);

6. Affidavit-in-reply (2) of Ching Lai Huat affirmed on 13 November 1999 (hereinafter referred to as "Ching's 2nd affidavit" (pp. 60-65 Appeal Record);

7. Plaintiff's 2nd affidavit-in reply of Peh Laay Hwa affirmed on 26 November 1999 (hereinafter referred to as "Peh's 2nd affidavit-in-reply").

The facts are as follows: The 1st defendant has breached the terms of the hire purchase agreement dated 27 October 1995 (hereinafter referred to as 'the said agreement") and is and was at the commencement of this action, justly and truly indebted to the plaintiff in the sum of RM98,340 as overdue installments;

RM22,250.89 as interest as at 12 June 1998 on overdue installments; RM48,691.23 as loss together with interest at the rate of 0.065% calculated on a daily basis on the sums of RM98,340 and RM48,691.23 from 13 June 1998 until the date of full settlement by the 1st defendant (hereinafter collectively referred to as "the said debt") (see paras. 3 and 4 of affidavit-in-support - pp. 11-14 in the Appeal Record; and exh. PLH-2 affidavit-in-support - p. 16 in the Appeal Record). The relevant clauses are as follows:

(i) Clause 3(b) - exh. PLH1 p. 12 of Appeal Record: Punctual payment of rent;

(ii) Clause 5(c) - exh. PLH1 p. 13 of Appeal Record: Interest at 0.065% daily until payment made;

(iii) Clause 17 - exh. PLH1 p. 14 of Appeal Record: *Prima facie* evidence clause.

The plaintiff has exhibited a certificate of the hirer's indebtedness at exh. PLH2 of the affidavit-in-support at p. 169 of the Appeal Record and the 1st defendant is bound by it for the sum owed. In *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 the Federal Court held:

> (4) in this case the respondents were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by the Vice-President of the bank as conclusive evidence of the debt due to the bank. On this footing the bank was entitled to summary judgment.

A judgment in default has been entered against the 1st defendant on 3 January 2000.

By a guarantee & indemnity dated 17 October 1995 (hereinafter referred to as "the G&I"), the 3rd defendant jointly and severally with the 2nd defendant have agreed to guarantee and indemnify the plaintiff of the said debt as a result of the breach of the 1st defendant under the said agreement and in and was at the commencement of this action, just and truly indebted to the plaintiff for the said debt. (see para. 9 of the affidavit-in-support; and exh. PLH5 of the affidavit-in-support p. 27 of the Appeal Record: Clause 1). Although the plaintiff demanded payment from the 3rd defendant *vide* a letter dated 13 June 1998, the 3rd defendant still failed, refused and/or neglected to make any payment. (See para. 11 affidavit-in-support; and exh. PLH7 affidavit-in-support p. 33-36 in the Appeal Record together with the proof of postage). The 3rd defendant is bound by the judgment in default which was obtained by plaintiff against the 1st defendant and cannot dispute liability of the 1st defendant to the plaintiff in accordance with the judgment in default. (see cl. 2G & I at exh. PLH5 of the affidavit-in-support at p. 27 of the Appeal Record).

It is the submission of the 3rd defendant that the plaintiff's notice of application did not state as a ground that "the 3rd defendant has no defence", as such the plaintiff's notice of application is defective. (see the plaintiff's notice of application at pp. 1-3 of the Appeal Record).

I observe that two grounds have been stated in the plaintiff's notice of application. It is not provided anywhere in O. 26A of the Subordinate Court Rules 1980 that in an application for summary judgment, it must be stated as a ground in the notice of application that the defendant has no defence to the plaintiff's claim. Order 26A r. 2(1) provides as follows:

> An application under rule 1 must be made by notice in Form 65 supported by an affidavit in Form 75A verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

I think most importantly and which must be adhered to is that the affidavit-in-support to an application for summary judgment must state that "in the deponent's belief there is no defence to that claim". This has already been complied with by the plaintiff at para. 14 of the affidavit-in-support (p. 8 of the Appeal Record). In *Tan Tik Sing v. Gomez Development Co Sdn Bhd* [1979] 2 MLJ 79, the court held:

> Held: dismissing the plaintiff's application: (1) the clear provisions of Order 14 rule 1(a) and Order 14A rule 1(1) are mandatory and they must be complied with if a plaintiff wants to get judgment without any trial whatsoever;
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> (2) in the present case the plaintiff had failed to say on affidavit that in his belief there was no defence to the action. The plaintiff's application for summary judgment under Order 14A was therefore deficient for want of compliance with rule 1(1) of the order.

Furthermore, the plaintiff's notice of application has made reference to the affidavit-in-support for further particulars in support of their application wherein the deponent of the affidavit-in-support has stated at para. 14 that in her belief, the 3rd defendant has no defence to the plaintiff's claim and this in itself is sufficient. In *BSN Commercial Bank (M) Bhd v. KDG Holdings (M) Sdn Bhd & Ors* [1999] 1 MLJ 567, the court held:

> Be that as it may, it would be sufficient compliance with Form 62 if a summons stated the grounds by reference to an affidavit-in-support of the application (see p. 569E-F).

The 3rd defendant further submitted that the said agreement is invalid as allegedly the plaintiff is not the exclusive owner of the goods hire-purchased but is sharing ownership with the 1st defendant who has made payment of

deposit to the dealer. I think the allegation of the 3rd defendant is unfounded. The plaintiff has purchased the goods hire-purchased from the dealer wherein the invoice for the said sale has been exhibited as exh. PLH8 in Peh's 1st affidavit-in-reply (p. 54 of the Appeal Record). It can be seen that the plaintiff has made payment of RM300,000 to the dealer *vide* a cheque. The plaintiff's ownership claim has also been endorsed in the registration card of the goods hire-purchased. I think although the 1st defendant has made payment of RM70,000 as the deposit, this will not make the 1st defendant a co-owner with the plaintiff. This is by reason that at the material time when the 1st defendant made the offer to the plaintiff for the hire-purchase facility, the 1st defendant have expressly agreed and/or acknowledged that the deposit paid by them to the dealer would be applied by the dealer towards the deposit payable under the said agreement and the said deposit therefore would constitute a valid deposit at law. Clause 2 in the 'offer' by the 1st defendant (p. 11 of the Appeal Record) states:

> 2. I/We confirm that I/we have handed to the Dealer abovenamed cash *and/or goods (which are correctly described in the Schedule above) and the amount applied by the Dealer in respect of the goods sold to him towards the deposit payable hereunder is at least equal in value to the deposit stated above and that the deposit was so paid or provided by me in a form and manner constituting a valid deposit at law.

As such, this means that at the time the said agreement was entered into ie, at the time when the offer by the 1st defendant was accepted by the plaintiff at 17 October 1995, the plaintiff was the exclusive owner of the goods hire-purchased and there was no co-ownership with the 1st defendant. Furthermore it can be seen in the case of *Malayan Credit Ltd v. Mohamed Kassim* [1965] 2 MLJ 134 wherein the facts are similar with the instant case wherein the hirer had also paid deposit to the dealer, and subsequently entered into a hire purchase agreement with the finance company. Hepworth J in making reference to the case of *Transport and General Credit Corporation Limited v. Morgan* [1939] 1 CH 531 agreed that the particular transaction in his case was a hire-purchase transaction and neither a bill of sale nor a moneylending transaction.

In the case of *United Investment and Finance Ltd v. Walker & Anor* [1967] 1 MLJ 30 Winslow J has decided that the transaction in that case was a hire-purchase transaction. Winslow J also stated that it is a recognised practice in commercial circle for the dealer to collect a deposit from the hirer prior to the entering of a hire-purchase agreement. There Winslow J said:

> In three-cornered transactions of this kind (ie, as between a financier such as the plaintiffs, a dealer such as the second defendant and a hirer such as RW Walker in this case) it is the recognised practice in commercial circles for the

> dealer to complete a proposal form after a customer has selected the goods he desires to acquire - in this case a motor-cycle - to collect a deposit from the customer which he retains and then to forward the proposal form together with a number of other documents duly signed by the customer to the financier in order that the financier can conclude a hire-purchase agreement with the customer who would thereby become a hirer. It is usual in these cases to have a separate agreement of some kind or a document evidencing the fact that a sale of the goods had taken place as between the dealer and the financier so as to vest the property in the goods in the financier before it becomes the subject-matter of a hire-purchase agreement.

In the instant case the plaintiff is the legal owner of the goods hire-purchased whereas the 1st defendant only holds the title of a registered owner of the goods hire-purchased. In *Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 84 the court held:

> Held: (1) upon the true construction oof the plain agreement which was of a type to which the Hire Purchase Act applied, until the hirer had exercised his option to purchase the car by paying the total rentals fulfilling all his obligations under the agreement, no property in the car passed to the hirer;
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> (2) even though the hirer was the registered owner of the car he was only in law the person who had possession and use of the car and this fact did not necessarily make him the legal owner of the car;

The nature of a hire-purchase agreement is also discussed in the case of *United Engineers (Malaysia) Ltd v. Lai Ping Yoon* [1968] 1 MLJ 189 wherein Gill J (as he then was) stated that the property in the goods hire-purchased remains with the owner. At p. 194 his Lordship stated:

> A contract where the property passes at once but the price is payable by instalments is clearly a credit sale. A hire-purchase agreement is more than a simple contract of hire, for it confers upon the hirer an option to purchase the goods. Thus a bailment coupled with an option to buy, as in *Helby v. Matthews* is clearly a hire-purchase agreement. By granting the option, the owner makes an irrevocable offer to sell the goods to the hirer if the conditions laid down in the agreement are fulfilled. On his part, however, the hirer is under no obligation to buy the goods. He may exercise the option, that is to say, he may accept the offer once he has fulfilled the conditions, if he so wishes, but he may also elect to terminate the hiring and return the goods to the owner without buying the goods. He has a power to accept the offer, but is not bound to do so. The importance of the option to purchase lies in the fact that the hirer is unable to pass a good title to a third party, because he is not a person who has bought or agreed to buy the goods. Since the property in the goods remains in the owner who lets them on hire, the retention of the ownership of the goods and the inability of the hirer (except in special circumstances) to pass a good title provide the owner with some measure of security in case the

> hirer defaults. The hirer, on the other hand, obtains the benefit of a credit transaction in that he receives the possession and use of the goods in advance of the payment of the price, and is enable to purchase the goods once the price has been paid. (see Guest on the *Law of Hire-Purchase*, pages 10 and 11, paragraphs 23 and 25.)

In the case of *Low Ping Ming v. MBf Finance Bhd* [2000] 2 CLJ 307 it was decided that throughout the period of hire-purchase, title to the goods remains with the owner. Therefore, unlike a sale of goods, no title to the goods pass from the owner to the hirer during the period of hire. Furthermore, it was decided that the finance company becomes the owner as well as the financier.

In the case of *Anglo-American Corporation (M) Sdn Bhd v. Dato' Phua Cheng Leong* [1969] MLJ 12 FC is the property in the said goods will only passes to the 1st defendant after the 1st defendant has made the last payment as provided by the said agreement. At p. 14 Gill FJ stated:

> A true hire-purchase agreement, as explained by the House of Lords in *Helby v. Matthews*, is an agreement by which the owner of a chattel lets it out on hire and undertakes that it shall become the property of the hirer when the hirer has paid the last of a certain number of payments specified in the agreement, but so that the hirer may return the goods at any time without any obligation to pay any balance of rent accruing after the return. Until those conditions have been fulfilled the property remains in the owner. Since no property in the chattel passes to the hirer until he has made the last of the payments specified in the agreement, the agreement need not be registered as a bill of sale. Such an agreement differs from a sale in as much as the hirer does not agree to buy. He merely has an option to buy on fulfillment of certain conditions, or he may return the goods on payment of a sum stated in the contract. In other words, a hire-purchase agreement is not an agreement to buy goods, unless it contains an obligation whereby the hirer is bound to buy.
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> The hallmark of a true hire-purchase agreement is that there is reserved to the hirer power to return the goods, either during the hiring, thereby determining the bailment, or after the conclusion of the hiring and before the payment of such further sum as is required to complete the purchase, so that the agreement is not a contract of sale but an agreement to hire with an option to purchase. In short, it is a bailment coupled with an option to buy. The agreement normally provides for a sum of money to be paid "in consideration of the option to purchase." Thereby granted either initially or at any time during the period of the hiring or at the end of the hiring.

The 3rd defendant alleged that the said agreement is allegedly a cloak for moneylending transaction. The 3rd defendant's allegation is unfounded as the said agreement is a hire purchase agreement having all the elements of a hire purchase agreement. In *Tractors Malaysia Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 FC, the Federal Court decided that it

was the intention of the parties that the property in the goods hire-purchased was not to pass to the hirer until full payment has been made by the hirer. In the instant case cl. 13 of the said agreement has also the same intention of the plaintiff and 1st defendant. (See cl. 13 of the said agreement at p. 14 of the Appeal Record). It is observed here that the 3rd defendant failed in his affidavits in reply to show how the said agreement is a cloak to moneylending transaction. In actual fact, the said agreement with its full terms and conditions is exhibited as Exhibit PLH1 in the affidavit-in-support. I am of the view that the 3rd defendant only made sweeping allegation in Ching's 1st affidavit that allegedly the said agreement is a cloak for moneylending transaction.

It is the submission of the 3rd defendant that the guarantee and implied condition (G & I) is void and unenforceable against the 3rd defendant as the said agreement is not a true hire-purchase agreement and also there are mutual mistake as to ownership by the parties. It is my judgment that the allegation of the 3rd defendant is unfounded as the said agreement is a true hire-purchase agreement and there is no whatsoever mutual mistake as to ownership as alleged. By reference to cl. 17, the 1st defendant have agreed that a certificate as to their indebtedness will be *prima facie* evidence of their indebtedness and as such the 1st defendant is bound to the sum certified by the said certificate. As the 3rd defendant has agreed under the said G & I to guarantee and indemnify all sums due and owing by the 1st defendant to the plaintiff which has been certified by the said certificate. As such, the 3rd defendant is bound by the sum certified as such. It is noted that the plaintiff at para. 7(c) in Peh's 2nd affidavit-in-reply, has shown the calculation for rebate is in accordance with r. 78. Although the said certificate is undated, there is no prejudice to the 3rd defendant as the sums which has to be calculated as at a certain date has already been calculated as such and such dates have been stated therein. In any event, the 3rd defendant only alleged that he challenged the sum stated in the said certificate on the basis that there is no calculation shown as to how the sum of rebate is obtained and also on the basis that the said certificate did not comply with cl. 17 of the said agreement. However, the 3rd defendant failed to show in anywhere of his affidavits-in-reply any manifest error in the calculation of the said certificate. As such, I view that the allegation of the 3rd defendant as unfounded.

In *Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn Bhd & Anor* [1988] 2 CLJ 87; [1988] 1 CLJ (Rep) 793 at p. 89; (795) Shanker J (as he then was) stated:

> The next point that was taken was that the sum claimed already included interest and since no explanation was given as to how this figure was reached the bank was not entitled to judgment. However, article 3.06(d) of the charge

specifically stated that the bank's certificate as to the interest rate applicable for any interest period shall, in the absence of any manifest error, be conclusive and binding on the company. Clause 12 of the guarantee agreement provided likewise. The defendants made no effort whatsoever to show that there was any manifest error or at all in the bank's certificate and consequently I hold that his submission is also without substance.

I am of the opinion that the issues are clear in the instant case. The said agreement is a true hire-purchase agreement with all the elements of a hire-purchase agreement. The 3rd defendant is liable to the plaintiff as a guarantor and indemnifier under the G & I for all sums due and owing by the 1st defendant to the plaintiff. The sum due and owing by the 1st defendant is certified by the Certificate of the Hirer's Indebtedness at exh. PLH2 of the affidavit-in-support (p. 16 of the Appeal Record) which is binding on the 3rd defendant. It is not denied in anywhere of the affidavits in reply that the 1st defendant is still in possession of the goods hire-purchased and is still enjoying and using the said goods.

For these reasons the appeal is dismissed with costs and the decision of the Sessions Court dated 30 March 2000 is hereby upheld.